United Nations A/CN.9/WG.IV/WP.151

General Assembly

Distr.: Limited
28 March 2018

Original: English

United Nations Commission on International Trade Law
Working Group IV (Electronic Commerce)
Fifty-sixth session
New York, 16–20 April 2018

Contractual aspects of cloud computing

Proposal by the United States of America

Note by the Secretariat

The United States of America submitted to the Secretariat a paper for consideration at the fifty-sixth session of the Working Group. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

V.18-01894 (E)

Please recycle

Annex

1. The United States of America expresses its appreciation to the Secretariat for its efforts in drafting A/CN.9/WG.IV/WP.148, entitled "Contractual aspects of cloud computing." While the United States of America has not seen a need for a checklist of main issues of cloud computing contracts, it has heard other delegations express support for such a document. Given this support by other delegations, the delegation of the United States has not objected to work on a checklist.

2. The United States of America believes that UNCITRAL documents should not attempt to provide legal advice or seem to favour one type of transacting party over another. A neutral approach is called for by paragraph 15 of A/CN.9/902, the report of the Working Group's fifty-fifth session, which states "After discussion, the Working Group decided to recommend to the Commission the preparation of a checklist of major issues that contracting parties might wish to address in cloud services contracts. In light of its nature, the checklist should not offer best practice guidance or recommendations. The need for preparation of guidance materials or model contractual clauses could be considered at a later stage." However, because WP.148 appears to provide legal advice and to favour one type of transacting party over another, the United States delegation cannot support the current draft and believes that it needs significant revision.

3. There are numerous examples of text that raise the aforementioned concerns. For the sake of brevity, this paper identifies some of the provisions of the draft checklist that appear to provide legal advice and that, moreover, appear to provide such guidance to only one party entering into a cloud computing contract (*i.e.*, the customer):

- Paragraph 43, which includes "The customer may lack any remedy under those contracts since the breach of professional best efforts provisions may be difficult to determine. To avoid such situations, the customer would be interested in including in the SLA quantitative and qualitative performance parameters with specific metrics, quality assurances and performance measurement methodology."
- Paragraph 77, which includes "Where no option to negotiate exists, the customer may need at least to review any IP clauses to determine whether the provider offers sufficient guarantees and allows the customer appropriate tools to protect and enjoy its IP rights and avoid lock-in risks ..."
- Paragraph 100, which includes "Providers' standard terms may contain the right of the provider to suspend services at its discretion at any time. The customer may wish to restrict such unconditional right by not permitting suspension except for clearly limited cases (e.g., in case of the fundamental breach of the contract by the customer, for example non-payment)."
- Paragraph 116, which includes "Customer data loss or misuse, personal data protection violations and IP rights infringement in particular could lead to potentially high liability of the customer to third parties or give rise to regulatory fines. Imposing a more stringent liability regime on the provider where those cases are due to the provider's fault or negligence may be justified."

4. The United States delegation will be prepared to raise and discuss additional concerns at the fifty-sixth session of Working Group IV.

5. Should the Working Group recommend continuation of work on a draft checklist of contractual issues relating to cloud computing contracts, and should the Commission accept that recommendation, the delegation of the United States would expect a neutral text that simply highlights the legal issues that may be present in such contracts, without appearing to assist one particular type of party to these contracts.